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Ragimov v. Bercznyski

Between
Eduard Ragimov, plaintiff, and
Maciej Bercznyski and Jacobsze Waldemar, defendants

[2001] O.J. No. 471

103 A.C.W.S. (3d) 74

Court File No. 98-CV-153895

Ontario Superior Court of Justice

Ferguson J.

Heard: January 8-12, 15-17, 2001.
Judgment: February 8, 2001.

(67 paras.)

Insurance -- Payment of insurance proceeds -- Actions, defences -- Burden of proof.

Action by **Ragimov** against Bercznyski for damages resulting from injuries that he incurred in a motor vehicle accident. **Ragimov** was in four motor vehicle accidents in 1993, 1995, 1996 and 1998. He brought the present action for the injuries suffered in the 1996 accident. He suffered physical and emotional injuries in the prior accidents, including soft tissue injuries to his neck and lower back, shock and depression, and a minor neck injury. He testified that in the 1996 accident, he struck his head on the steering wheel and suffered neck and upper back injury. He said that he experienced symptoms which included headaches, pain, numbness and tingling in his right shoulder and arm, and blurred vision. At trial, he submitted that he had no symptoms before the 1996 accident and that all of the current symptoms were materially related to that accident. He further testified that following the accident, and as a result of the injuries, he has not engaged in numerous social and recreational activities that he had previously engaged in. His physician testified in support of him.

HELD: Action dismissed. **Ragimov** was not entitled to damages because he had not established that he sustained a serious impairment of an important physical, mental or psychological function. He was an unreliable witness and grossly exaggerated his injuries and symptoms. He contradicted him-

self and his testimony conflicted with his physician's testimony. The physician's testimony was also unreliable, particularly with respect to the history of his involvement with **Ragimov. Ragimov** also failed to call sufficient corroborative evidence. Although he established on a balance of probabilities that he sustained an impairment of physical, mental and psychological functions, he did not demonstrate that the impairment was serious. He failed to establish on a balance of probabilities the degree of impairment of his functions, how long the impairment lasted, and what activities were interfered with.

Statutes, Regulations and Rules Cited:

Insurance Act, s. 267.1(5).

Counsel:

Gerald Sternberg, for the plaintiff.
Linda Mathews, for the defendants.

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1 **FERGUSON J.**:-- This is a "Bill 164" motion at trial under s. 267.1(5) of the Insurance Act to determine if the plaintiff has proved that he falls within an exemption to the immunity of the defendant from liability. The plaintiff contends that he suffered a serious impairment of an important physical, mental or psychological function.

2 The motion was argued after the jury was charged but I reserved my decision because of the need to obtain the assistance of the court reporter to review some areas of the evidence.

BACKGROUND

3 The plaintiff came to Canada in January 1993 and applied for refugee status. His application was eventually denied and until the spring of 2000 he was only authorized to work for a period of 6 months in the spring of 1996.

4 He was in 4 motor vehicle accidents which took place in 1993, 1995, on October 3, 1996 and in 1998.

5 He is suing in this action for the injuries he alleges he suffered in the 1996 accident.

6 He testified that in the 1993 accident he suffered shock and developed a stutter which he still has. He said he also suffered from depression and was hospitalized for 8 weeks. He also suffered soft tissue injuries to his neck and low back. He started his treatment with one family doctor and then switched to Dr. Brodsky. Dr. Brodsky testified that the plaintiff had sustained a mild concussion and brain injury and signs of fibromyalgia. On his discovery the plaintiff stated that he had had concentration problems since the 1993 accident.

7 He testified that in the 1995 accident he suffered very minor neck injury. He was treated by Dr. Brodsky who referred him to the Integrated Health Clinic. Dr. Brodsky saw him 3 times and he went to the clinic for about 2 months.

8 He testified that in the 1996 accident he struck his head on the steering wheel and suffered injury to his neck. He said he experienced symptoms of headache, pain in his neck, pain and numb-

ness and tingling in his right shoulder and arm, blurred vision, inability to sleep and problems with concentration. Later in his testimony he added that he injured his upper back.

9 About a day after the accident he went to a hospital emergency clinic and then 4 days after the accident he went to Dr. Brodsky who again referred him to the Integrated Health Clinic. Dr. Brodsky saw him 3 times. Dr. Brodsky's notes for the second and third visits on November 7 and 21 stated, "no neurological signs" and mentioned nothing about blurred vision or any other problem except neck and back pain. The plaintiff went to the clinic for about 4 months.

10 He testified that in the 1998 accident he suffered a very minor injury to his neck and low back with pain in both shoulders.

11 He has sought no treatment since he stopped attending the clinic in February 1997.

12 At trial he claimed that he had no symptoms just before the 1996 accident and that all his current symptoms were materially contributed to by the 1996 accident.

13 With respect to the duration of the injuries caused by the 1996 accident he said the upper back pain resolved but he is not sure when. He said the pain, numbness and tingling in his right arm and fingers and the pain in his shoulders cleared 18 months after the 1996 accident.

14 He said the headaches continue 24 hours a day and that Tylenol provides no relief.

15 He claimed he has had constant neck pain up to the present and that his range of motion is not great. He claims both sides of his neck are still numb.

16 He said he still "just loses" his vision after he reads for 40 minutes and then must take a break for an hour or as long as a day. When this happens he cannot concentrate.

17 He claimed he could not afford more treatment or pain medication after February 1997 because he was unable to arrange provincial medical coverage because of his immigrant status.

18 He had a girlfriend in 1993 and married another woman in January 1998.

19 He worked from May until December 2000 with a catering company doing delivery and serving work. Then he was laid off.

20 He testified that just before the 1996 accident he was engaged in numerous social and recreational activities. He said he jogged two miles a day, composed a lot of music which he showed to friends and had recorded for promotional purposes, went disco dancing at least twice a week, socialized with lots of friends, read lots of novels, had a membership at a community centre where he swam, and worked on scripts which he hoped might be used on community television programs.

21 He said that as a result of his injuries from the 1996 accident he had done none of these activities since the 1996 accident except that he can read for 40 minutes until he "loses his vision".

ISSUES

22 There were innumerable facts in dispute. The main issues were: whether the 1996 accident caused any injury other than a short term whiplash; what physical, mental or psychological functions were impaired as a result of the 1996 accident; and whether the impairment was serious.

ANALYSIS

23 I should say at the outset that this was a very unusual trial. The only witnesses called by the plaintiff were the plaintiff himself and Dr. Brodsky. The plaintiff adduced no medical evidence ex-

cept the testimony of Dr. Brodsky and a list of treatment dates (with descriptions of the treatment) from the clinic for the attendances after the 1995 and 1996 accidents.

24 The fact that additional supportive evidence was not adduced by the plaintiff is remarkable because it was clear from the outset that the defence position was that it didn't accept much, if anything, of the plaintiff's evidence.

The reliability of the plaintiff's testimony

25 I found him to be an unreliable witness.

26 I find that he grossly exaggerated his injuries and symptoms.

27 He occasionally contradicted himself. Significant parts of his testimony conflicted with the testimony of his own doctor, Dr. Brodsky, and with the testimony of Dr. Lloyd who conducted a defence medical. His repeated explanation for not seeking further treatment or taking medication was rebutted by his admission that his insurance company was paying for his treatment and gave him significant cash settlements which he could have used. His claim that he was unable to pursue all his alleged pre-accident activities appears in conflict with his ability to work for a caterer. He claimed there was damage to a part of his car which did not show up in the photographs filed as exhibits. I find he did not tell Dr. Brodsky he hit his head in the accident. I find he failed to attend an appointment which he knew Dr. Brodsky had arranged with a physiatrist despite the fact that he claims he was having continuing problems and only refrained from seeking further treatment because he could not afford it.

The reliability of Dr. Brodsky's testimony

28 I found his testimony unreliable as to the history of his involvement with the plaintiff.

29 After the accident on October 3, 1996 he saw the patient on October 7, November 4 and November 21, 1996. He has not seen him between then and trial.

30 For most of his testimony during his examination in chief he read from the letter he wrote the plaintiff's counsel on February 7, 1998 some 14 months after he last saw the plaintiff. He said he had no independent recollection of the two November visits and that he saw 2 or 3 patients a month who had been in rear-end collisions.

31 He gave testimony about a great deal of history taken from the plaintiff and about examinations, observations and diagnoses about which nothing appears in his very brief notes made at the times of the visits. For example, he testified that on one or more of the three visits after the 1996 accident the plaintiff described a panic attack, showed signs of a concussion, reported headaches, complained of blurred vision, demonstrated a significant deterioration of his stutter, complained of insomnia and nightmares, presented with a stiff body position, and told the doctor that he ranked his pain as a 7 on a scale of 1 to 10. There is not one word in his notes about those matters.

32 He said he based the letter of February 1998 on his notes, his memory and the documentation he received from other sources. It appears to me that he has reconstructed the history based on information he obtained from others.

33 He said he could not express any opinion as to what he would expect as to the course of recovery after his last visit.

34 Dr. Lloyd gave the opinion that the plaintiff suffered no more than a moderate whiplash and an injury to his back which would have produced short term symptoms.

The absence of evidence

35 The testimony of Dr. Brodsky and Dr. Lloyd indicated that depression can be associated with concentration problems. The evidence indicated that the plaintiff had suffered a major depression, headaches and problems with concentration after the 1993 accident and been hospitalized. The psychiatrist who treated him then was not called.

36 The first assessment of the plaintiff after the 1996 accident was a day later at a hospital emergency department. No evidence was called from that department.

37 Dr. Brodsky testified that after the 1995 and 1996 accidents he sent the plaintiff for treatment by specialists at the clinic and it appears that all the treatment after the 1996 accident was given there. No evidence was called from the clinic.

38 Although the plaintiff's claims about being unable to participate in his pre-accident activities were obviously disputed not one witness was called to support his claims. His wife would be the most obvious witness and she was not called. She did attend the trial to hear part of the jury charge.

39 The plaintiff's testimony was unpersuasive and contradicted in material respects. He called none of the potential evidence mentioned above to confirm his testimony and adduced no evidence that it was not available. The plaintiff knew from the opening of the 8 day trial what evidence the defence was going to call.

The roles of judge and jury in "threshold" cases

40 Before I explain my analysis further I would like to provide the parties and their counsel - and indirectly the legislature - with some feed-back as to the practical operation of the "threshold" scheme applicable to motor vehicle claims under the Insurance Act.

41 We have now had experience with a series of schemes intended to limit the types of claims which are litigated. Under this scheme, Bill 164, and the current scheme in Bill 59, there is a requirement that the trial judge make a determination as to whether the disfigurement or impairment alleged is "serious". In the current scheme a determination is also required as to whether it is "permanent". In both schemes the trial judge must determine if the impairment was caused by the accident.

42 In Bill 164 the Act states:

> 267.1(5) If no motion is made under subsection (3), the trial judge shall determine if, as a result of the use or operation of the automobile, the injured person has died or has sustained,
>
> (a) serious disfigurement; or
> (b) serious impairment of an important physical, mental or psychological function.

43 One of the problems with this approach is that if there is a jury trial there are two triers of fact independently assessing the same evidence and making decisions as to what facts are proved. This creates a real risk of inconsistent findings. For example, in assessing damages the jury must deter-

mine what injuries were caused by the accident. The trial judge on the motion under s. 267.1(5) must simultaneously determine what injuries were caused by the accident. The issues the jury and judge must determine are different but in arriving at their decisions each must make some of the same findings of fact.

44 The jury might find no causation; for instance they might not believe the plaintiff or might not accept certain expert testimony. The trial judge might arrive at the opposite conclusion because the judge must make an independent assessment of the plaintiff and of the expert evidence.

45 This risk can potentially bring the administration of justice into disrepute.

46 I suggest the flaw in the scheme is that both the jury and judge are required to make the same factual determinations in order to fulfil their roles. I suggest there are other mechanisms which would more justly accomplish the goals of the legislation.

What injury did the 1996 accident cause?

47 I conclude that the plaintiff proved only that he sustained a soft tissue injury to his neck (a whiplash) and back.

48 I conclude that he has not proved he sustained a concussion or any brain injury.

49 I conclude he proved that he suffered the typical whiplash symptoms consisting of pain, some limitation of movement of the neck and back, some short term blurred vision and short term headaches.

50 My dilemma on this motion is that I do not accept the plaintiff's testimony as to how long his symptoms lasted or as to how the symptoms affected his life. He claimed that the disputed symptoms lasted from the time of the accident to the present. If I reject that, what evidence do I have as to how long they lasted? How do I decide the extent of any impairment? He gave no specifics of the types of symptoms I accept he suffered immediately after the accident other than to say he had pain and trouble sleeping.

Was the impairment "serious"?

51 I adopt the approach to analyzing the exemption issues outlined in Mohamed v. Lafleur-Michelacci [2000] O.J. No. 2476 (Nordheimer J.).

52 I find that the plaintiff has established on a balance of probabilities that he sustained an impairment of physical, mental and psychological functions which would normally be affected by a moderate whiplash injury. I find he has established that those were important functions for the plaintiff. There was really no dispute about these issues.

53 However, I find the plaintiff has not proved that the impairment was serious.

54 The plaintiff's counsel argues that even if I find that the impairment was not permanent, the impairment of functions by the whiplash did at least temporarily interfere with the activities the plaintiff claims he could no longer participate in. He points to reading, sleeping, composing, jogging, dancing, working on television scripts. He says that if the symptoms interfered with his ability to perform those activities for even a short period then the impairment was "serious".

55 He relies on the oft-quoted passage of Kerr J. in Marleau v. Falconer, [1997] O.J. No. 5415, (May 28, 1997):

> It is my view that it is crystal clear from the Statute that there is no temporal restriction in the amending legislation. If the infant plaintiff has suffered a ... serious impairment of an important physical function in this case, of no matter what duration, the claim for damages crosses the threshold. The deductible under section 267.1(8) will apply to the majority of cases where the effects of the injury are short lived. [my underlining]

56 I agree with what Kerr J. said. He said the claim crosses the "threshold" if the court finds that the impairment was serious regardless of how long the serious impairment exists.

57 However, what the plaintiff's counsel overlooks is that the court must find that the impairment of the function was serious. And he overlooks the authority which says the court is not restricted in what factors it can take into consideration.

58 In Meyer v. Bright (1993), 15 O.R. (3d) 129 the Court of Appeal laid down how the trial judge is to determine if the impairment was serious. The court said:

> It is simply not possible to provide an absolute formula which will guide the court in all cases in determining what is "serious". This issue will have to be resolved on a case-to-case basis. However, generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment. (at p. 142) [my italics]

59 This passage indicates that the trial judge can consider other factors in addition to the "substantial interference", that each case is different, that generally speaking it is not the degree of impairment of the function that is determinative but the effect of the impairment on the plaintiff's normal activities including employment, and that the court can consider the effect on the normal range of activities and need not just focus on one of many activities.

60 It seems to follow that the court can consider how long the impairment affected the plaintiff's activities in determining if the impairment was "serious". Time is a relevant factor in considering if there was a substantial interference with the ability to perform usual daily activities and employment.

61 Because the degree of impairment is not determinative, it is possible that a plaintiff might suffer a total impairment of an important physical, mental or psychological function and the court might still find that it was not "serious". If the impairment totally prevented the plaintiff from going dancing for one evening I do not think that would be a "serious" impairment. If the impairment totally prevented the plaintiff from reading a book and going dancing and jogging for one day, I do not think that would be a "serious" impairment.

62 Time is a relevant factor in determining if the impairment is serious.

63 Whether any activity would normally occur during the period of impairment is a relevant consideration. If the impairment lasted overnight when no activity would normally occur anyway then it would not necessarily be serious even if the degree of impairment was extreme. If he were unable to read for 8 hours but spent that entire period sleeping overnight then I do not think the impairment would be serious.

64 The nature of the activity interfered with and the importance of the activity to the plaintiff are relevant considerations. If a concert pianist were unable to play for one day and that was the day of his main concert of the season that might well be a "serious" impairment. If an amateur could not play the piano at home for one day that would not be.

65 In this case the plaintiff has not established on a balance of probabilities the degree of impairment of his functions, how long the impairment lasted, what activities were interfered with or for how long. The plaintiff has not proved that there was a substantial interference with his ability to perform his usual daily activities. In the absence of that proof I cannot find that the impairment was serious.

66 I determine that the plaintiff has not proved that he sustained a serious impairment of an important physical, mental or psychological function.

COSTS

67 Counsel shall include their submissions as to the costs of this motion in their written submissions as to costs of the action.

FERGUSON J.

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